UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

SABO, INC. dba HOODVIEW VENDING CO.)	
and)	Case 36-CA-10615
ASSOCIATION OF WESTERN PULP AND PAPER WORKERS UNION, affiliated with UNITED BROTHERHOOD OF CARPENTERS AND JOINTERS OF AMERICA)	
	,	

RESPONDENT'S BRIEF IN RESPONSE TO EXCEPTIONS

PRELIMINARY STATEMENT.

On February 4, 2010 the Association of Western Pulp and Paper Workers Union ("Union") filed a Charge asserting that Sabo, Inc. dba Hoodview Vending Co. ("Respondent/Company") "illegally fired" LaDonna George ("Ms. George"); and, further that it improperly sought to cause the State of Oregon to deny her unemployment benefits. General Counsel Exhibit 1(a) ("G.C. Ex."). The Regional Director dismissed the charges. The General Counsel reversed that decision, but dismissed the claim in regard to unemployment. On August 25, 2010, the General Counsel issued an Amended Complaint. Stated solely in conclusory terms, it alleged retaliation against Ms. George because she formed, joined, and/or assisted the Union and engaged in protected, concerted activities for the purpose of discouraging employees from engaging in the same or other protected activities. No factual allegations were made. G.C. Ex.

1(f). In the Answer to the Amended Complaint, Respondent denied that it had violated the N.L.R.A. and affirmatively alleged a Section 10(b) defense. G.C. Ex. 1(h). The hearing was convened before Administrative Law Judge, Lana H. Parke (hereinafter "ALJ"), on September 21, 2010. She issued her Decision on November 30, 2010 dismissing the Complaint.

On December 23, 2010 the Regional Counsel, stating that it needed additional time to file exceptions because it had just learned General Counsel thought it warranted, asked for Respondent's consent and it did so. The extension was approved to and including January 18, 2011. That made this brief due on February 1, 2011.

ISSUES

- 1. Should the Decision of the ALJ dismissing the 8(a)(3) allegations of the Complaint be affirmed.
- 2. Should the Decision of the ALJ dismissing the 8(a)(1) allegation of the Complaint be affirmed.

DISCUSSION OF FACTS

The Company

The Company was formed 18 years ago. Transcript page 142 ("Tr."). It delivers soft drinks, candy and the like on some routes; cold foods, i.e., sandwiches and the like, to major 24-hour accounts; and coffee service to other accounts. Tr. 140-142. The "Great Recession" has had a toll on the success of the business, particularly with the loss of two major accounts, Stream and Wal-Mart, during the last 22 months. Tr. 165-167. One consequence of this downturn was to reduce the number of routes from eight and one-half to six. A second was to eliminate an office position. Tr. 142-143. A third was to downgrade its General Manager, Mike Layton, to providing maintenance on vending machines. Tr. 143.

¹ It was not until midway through the hearing that the General Counsel discussed the intent to assert that the conversation of January 18, 2010, on a stand alone basis, constituted a violation of 8(a)(1).

In addition, the Company was beset by a series of major legal costs: Defense of two law suits, steering through the election process and related unfair labor practices, and defense of this claim were costly. The Company hangs on by its fingernails. Tr. 165.

Personnel/Majority Status

In throwing a security blanket over certain employees, the Union informed the Company that seven of ten potential bargaining unit members desired to be represented and identified each of them by name. Joint Exhibits 2, 3(a)-(c) ("Jt. Exs."). One of these, Javier Iboy, resigned prior to the election. Respondent Exhibit 2 (R. Ex."). A second, Gary Dalton, was permanently laid off. Tr. 143. While the Union filed a Charge in regard to the lay off, the Region dismissed the Charge. Tr. 143-144. Mr. Stover was hired on February 2nd as a replacement to Iboy. R. Ex. 2.

Of the seven persons identified by the Union in Exhibit 3(a)-(b), one remains employed; one retired; three quit; one, Mr. Dalton, was laid off compliant with the NLRA; and only Ms. George was terminated. R. Ex. 2. Indeed, as Ms. George testified, so many route drivers came and went it was like a revolving door. Tr. 101. Indeed the record substantiates that "24 people have rotated through what are now merely 6 positions." R. Ex. 2.

If the Union ever had a majority, as it represented to the Respondent on January 27, 2009, the election was a draw, with two (2) challenged ballots. Jt. Ex. 5. Both parties filed objections to conduct alleged to have improperly effected the election. Rather than to litigate these matters, the parties agreed to set aside the March 10 election and proceed to rerun it. Jt. Ex. 6. The election was set for early January 2010, but on December 31, 2009 the Respondent was informed by the Acting Regional Director that the Election Petition had been withdrawn with prejudice. Jt. Ex. 7.

Election Campaign/Union Animus

The ALJ found sufficient evidence of union animus to satisfy *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F2d 899 (1st Cir. 1981), *cert. den.* 455 US 989 (1982). Respondent, while not in agreement with their finding, will not challenge it. Nonetheless it is important to a

full appreciation of the 8(a)(3) issue, to discuss the relevant facts to illuminate the critical issue of motivation.

The General Counsel sought to demonstrate union animus in two ways. First, to point to the electioneering speech made by Sally Hill on February 19, 2009; and to the literature distributed to the employees. Second, he alleges possible unfair labor practices that may have occurred between February 2009 and May 31, 2009.

Electioneering

Prior to reciting the evidence, it is important to bear in mind that Respondent objected to introduction of evidence that constituted expressions of opinion, and its objection was preserved. It did not waive that objection. Tr. 37-38.

Mr. Covington testified that Sally Hill stated during an all hands meeting that, even if the Union won the election, the Company would not bargain. Tr. 36. He forgot that he taped the meeting. A careful review of R. Exs. 12 and 13 flatly contradicts this testimony, as did the testimony of the Hills. Tr. 160, 202. Even Ms. George did not have the temerity to support this testimony. What was said was:

"* * If, by some unfortunate mistake, the Union wins this election, all we have do to is bargain in good faith-which of course we would do. But, legally, we do not have to agree to anything. The union would find us the toughest employer they have ever come up against. We would deal hard, and we would deal at arm's length."

Mr. Covington could not remember if this was said. Tr. 50.

The ALJ did not find that this incident was proof of union animus.

The information and brochures prepared by Respondent's consultant, Mr. Rudnick, R. Ex. 4, was merely a truthful recitation of crimes committed by this Union's employees; R. Exs. 5 and 6 merely recite the legal rights and obligations of the Union and of the Employer--nothing remarkable or violative of the NLRA. Again no negative finding on this issue was made by the ALJ.

Finally the Company stands accused of union animus because it thanked its employees because they did not choose to be represented. Tr. 45-49; G.C. Ex. 8. Nothing could have lesser evidentiary weight than a thank you. And, no negative inference was drawn by the ALJ.

<u>Unfair labor practices.</u>

Any alleged unfair labor practice which predates August 4, 2009 is barred by §10(b). At best, it may be utilized as background information bearing on union animus. The General Counsel introduced the settlement agreement between the parties, dated August 27, 2009, G.C. Ex. 2, over objection of the Respondent. The agreement contained a non-admissions clause. It was admitted solely for the purpose of establishing that some charges, none of which were identified, had been settled. The ALJ correctly ruled that the settlement did not constitute an admission of wrong doing and the notice would not be treated as substantive evidence of a violation. *Clinton Foods dba Morton's IGA Food Liner*, 237 NLRB 667 (1978); *Titus LLC*, 2010 NLRB LEXIS 300 (2010); *NLRB v. Northern California District Council of Hod Carriers and Common Laborers of America*, 389 Fed 721 (9th Cir. 1968). Rather the General Counsel was required to introduce substantial evidence of prior misconduct to establish union animus which was a motivating factor in the termination of Ms. George. Tr. 29-30.

Pay Day Conversation

Mr. Covington testified that he was told that if the Union won, flex start times; benefits; and the Iron Man Award would be eliminated. Tr. 43-44. Both Hills categorically denied that such a statement had been made. Tr. 161-162, 202-203. Indeed, it is more than probable that the message was as written in G.C. Ex. 5, i.e. "the employer must maintain status quo until he presents a final offer to the union, which could be less, more, or the same as you have now."

While Mr. Covington stated that the Ironman Award was contingent upon the outcome of the election, Tr. 43-44, 57, the award had not been made since **2006**, three years prior. Tr. 162. Further, the Company could not reinstitute the award pending the election, lest it be viewed as an improper inducement. Similarly, it had not had any "SPIFFS" since 2006. Tr. 162, 203. Again

G.C. Exs. 5 and 6 corroborate their testimony, i.e., benefits and certain conditions would be frozen pending consummation of negotiations.

The ALJ found this conversation to constitute union animus, even though the clear weight of the evidence was to the contrary.

Prohibition on Talking About the Union

The Company Handbook provides that employees may not solicit during working time for any purpose. R. Ex. 6, p. 10. Sally Hill testified that employees were told merely that they need to be working, not standing around talking, while on the clock. Tr. 190. Mr. Hill recalled that on one occasion he told some employees that they ought not to be talking about the Union on Company time, so to break it up. Tr. 210. There was no testimony that the rule was discriminatorily applied, i.e., that Mr. Hill would not have said and done the same thing if employees were standing around, on Company time, talking about other, non-business related subjects. Similarly, the ALJ made no finding that this activity proved union animus.

Ladonna George, Employment History Prior to January 1, 2010

Ms. George was hired as a Route Driver in 2001. Tr. 60. She was promoted to Route Supervisor in May 2007. Tr. 61. Her duties were defined to include overseeing proper performance of routes by the drivers; to provide a weekly audit of the performance of the drivers on their routes; to fill in for drivers who were ill or on vacation; and to fill in for Sally Hill when she was away. R. Ex. 7. On February 27, 2009 she volunteered to step down as the Route Supervisor, even though she would sacrifice \$500 per month in wages. Tr. 97-98. This offer was not accepted then, but was accepted in November of 2009 after she was admonished for her performance. Tr. 73; R. Ex. 3.

The Company Handbook states employment is "at will." It expressly provides that the Company reserves the right to terminate "with or without just cause or prior warning." R. Ex. 6, p. 2. *Ibid.* p. 9. Sally Hill, in practice, issued memoranda and warning notices. A memorandum was a written admonition to improve performance. A written warning was a form of discipline. Tr. 153.

During the period Ms. George served as a Supervisor, she was the subject of a series of memoranda. On January 14, 2008, she was admonished about negativism; her failure to promote es' prit de corps among the drivers; if employees were observed gossiping to notify the employee to speak with someone who could solve the problem; and to perform the essential functions of her job. R. Ex. 9. A similar admonition was issued on March 25, 2008. In September of 2008, she and another worker were admonished about excessive milk spoils. R. Ex. 10. Finally, she was given a memorandum in December, 2008. R. Ex. 11. Sally Hill testified that it was erroneously styled a memorandum, and was intended as a written warning: Working a short day; slow work; and failure to report a near accident resulting in injury to Ms. George. Tr. 152-156. It concluded by stating, "Improvement in time management and following established procedures as outlined in the employee handbook is expected." R. Ex. 11. She had been admonished with regard to slow work, both before and after she became a Route Supervisor several times. Tr. 64-65. Ms. George acknowledged that she was rated the second slowest driver. Tr. 65.

Post January 1, 2009

Together with six of the other ten route personnel, Ms. George served on the organizing committee. Jt. Ex. 3(a)-3(c). Second, on February 2, 2009 she was given a written warning for failure to follow a schedule while splitting time between reception and supervisor duties; for taking too much time to complete a route; and for failure to adequately audit the work of other drivers. G. C. Ex. 9. Third, she did testify on February 6, 2009 at the election hearing, on the subject of whether she was a statutory employee. Fourth, as reported above she offered to step down as Route Supervisor on February 27, 2009, which was declined on March 2, 2009. Fifth, the Election was conducted on March 10, resulting in a tie. Jt. Exs. 5 & 6. Between that date and the end of May, the record is silent. At the end of May, Ms. George received one (1) memorandum and two (2) warning notices. Tr. 74. The subjects were spoils; failure to return phone calls; failure to respond to weekend calls; skipped accounts without telling anyone; excessive route time; and failure to complete her route in a timely manner. Tr. 74-75, 168-170.

In a meeting with the Hills, she declined to respond to the issues, promising to study the documents and respond the following day. Tr. 75. Prior to the following day, she spoke with the Union, which filed an unfair labor practice Charge with the NLRB. On the following day, Mr. Hill inquired why she hadn't done as she promised and respond to the Company rather than call the Union. Tr. 75-76. She responded that the Union had called her. After consultation with its labor consultant about the memorandum and warnings, the decision was made not to terminate Ms. George. Tr. 169-170.

In July 2009, Ms. George was on the verge of termination. Indeed a termination letter was prepared. This again involved skipped accounts, preceding the 4th of July, which would result in spoiled merchandise that could have been sold elsewhere. R. Ex. 14. She was the only employee that failed to perform as instructed. The termination was converted to a written warning, again upon advice of counsel. R. Ex. 14; Tr. 169-172.

The record is silent until November, when Ms. George, voluntarily stepped down as Route Supervisor and became an every day Route Driver, on the Cold Food accounts.

The ALJ made no finding that the conduct was motivated by union animus.

Post January 1, 2010 and the Events Leading Up to Termination

During the month of January, the Company was faced with manpower shortages. This was due, in part, to the unavailability of Karen Burke, due to injury, and some personal problems that faced Keith Neary. Tr. 175. It was of vital importance that all able bodied hands be available for work. For example, Mr. Brown asked, well in advance, for time off. While it was tentatively allowed, he was told that it might well be and it was cancelled. G.C. Ex. 16; Tr. 194-195.

On January 5, a memorandum was issued to the drivers handling the Charter Account. R. Ex. 15. Ms. George was a recipient. Tr. 173. This is a Cold Food account that operated 24 hours per day. It demanded that the morning delivery be made by 8:30 a.m. Ms. George had failed to make timely delivery to this account. Indeed the Company was fearful that if it failed to meet this schedule it would lose this major account. Tr. 174.

On January 6, in the late evening, Ms. George's father passed away. Tr. 78. She sought to call the Hills, unsuccessfully, but left a message on the Company answering machine that she would not be available to work. She did not work on either the 7th or the 8th. On Friday, January 8th, Bob Hill called her and they spoke. Tr. 81. She advised that her father was being cremated and that there would be no service. Tr. 82, 104, 206. She also committed to work the following week. She did work Monday through Thursday (January 11-14). Before leaving on Thursday, she left a written request to be allowed the following Monday and Tuesday off (January 18-19). Tr. 83. She then went to a service at 2:30 p.m. at which her father was interred. She did not tell anyone at the Company about the service. Tr. 105. Thus the only information that the Hills had was that there was no service.

Later during the 14th, Sally Hill received the written request for time off the following week. Given the shortage of manpower, she declined the request and left her response for Ms. George. Tr. 176-177. Ms. George arrived at work on the 15th, about 6:00 a.m. She read the note, became irate, and balled it up. Tr. 106. She then states that she wrote on the document, "I just buried my Father yesterday and I am not in a condition or state of mind to be driving or working right now." G.C. Ex. 13. She stormed off the premises without giving any verbal notice to anyone. The note was discovered by Mr. Hill after his arrival. Tr. 178. He called and left a voice message to talk with her, but she did not respond. Tr. 204-205, 208. The Company had to scramble to cover her accounts, particularly the sensitive Charter Account. Tr. 178. The Company apologized to Charter in advance for its inability to timely deliver product, a required condition of retaining the account. Tr. 178. Charter was unhappy. Her written note on the balled up piece of paper was inconsistent with what she told Mr. Hill on the 8th, i.e., that there would be no service. Later that day, Sally Hill sent a final warning to Ms. George. G.C. Ex. 14. She was informed that she must report for work the following week.

On January 18th, Ms. George reported for work. She had a conversation with Steve Boros and perhaps one other employee. She stated that Craigslist reflected a job opening, presumably at HoodView. Tr. 80-81. Based upon what she said, Mr. Boros inferred that he was

going to be fired. Tr. 121-123, 128. He was very concerned and went in to speak with Bob Hill. Tr. 124, 130. He asked if he was going to be fired. Bob Hill inquired why he thought that, and Mr. Boros responded, "I said it was--that LaDonna told me that I was going to be fired." Tr. 124-125, 130. He then had a separate meeting with Sally Hill, and the same conversation occurred. Tr. 125, 180; R. Ex. 16. After receipt of the report that Ms. George had upset Steve Boros by falsely stating that he was going to be fired, Sally Hill confronted Ms. George. She denied making the statement. Tr. 181-182.

After careful consideration, early the following morning, January 19th, Sally Hill terminated Ms. George, stating that she was not trustworthy. And, of course, the Company could fairly come to that conclusion: She had abruptly left work on the 15th, leaving the Company in the lurch; she had told the Company that there would be no service and then said there was; and she was directly contradicted by Mr. Boros in regard to their conversation. Tr. 182-183.

Legal Standards

An employer has the absolute right to terminate an employee for good reason, bad reason or no reason at all, so long as it is not in retaliation for union activities or support. *NLRB v. Ogle Protection Service, Inc.*, 375 F2d 497, 505-506 (1967). Nor may the General Counsel substitute his judgment for that of the employer as to what constitutes reasonable grounds for discharge. That judgment is remitted to the discretion of the employer.

The NLRB, in Wright Line, 251 NLRB 1083 (1980), enfd. 662 F2d 899 (1st Cir. 1981), cert. den. 455 US 989 (1982), enunciated the standards that govern discipline or discharge cases. The General Counsel bears the initial burden of establishing the existence of protected activity; knowledge of that activity by the employer; and union animus. The Board and Courts have further required the General Counsel to prove that an employee's union activity was a motivating factor in the decision to terminate. Kentucky River Medical Center, 355 NLRB No. 129, fn 5 (2010); American Gardens Management Company, 338 NLRB 644, 645 (2002); Nordstrom dba Seattle Seahawks, 292 NLRB 899 (1989). If the employer rebuts the prima facie case, the

complaint must be dismissed. If it cannot, then it must demonstrate that the same discipline would have been meted out for legitimate reasons, regardless of the protected activities.

The courts have been clear that general hostility toward the union does, in and of itself, supply the element of unlawful motive. *Carleton College v. NLRB*, 230 F3d 1075 (8th Cir 2000); *GSX Corp. of Missouri v. NLRB*, 918 F2d 1351, 1357 (8th Cir. 1990). An employer's stated or avowed opposition to a labor union is not, in itself, sufficient evidence to sustain an adverse finding. Further, membership in a union does not immunize employees against discharge for reasons not motivated by union hostility. *Ibid.* 506. Additionally care must be exercised to avoid the prohibition of Section 8(c). That section clearly interdicts proving a violation of the Act by reliance upon opinions, unaccompanied by coercion, expressed by the Employer. *NLRB v. Lampi, LLC*, 240 F3d 931 (11th Cir. 2001). Recently an Administrative Law Judge underscored the issue in *First Transit, Inc.*, 2010 NLRB LEXIS 48, 73-74 (2010), in a string cite of cases shielded under 8(c), such as "Thank God you guys are not Union"; supervisor expressing a preference for a non-union shop and that his employees ought not to support the union; employer did not need a "damned Union"; union would not do employees any good; owner would not "go for a union in there"; no need to call a union in to resolve issues, etc.

Proof of unlawful motivation may be shown by direct or circumstantial evidence, not protected by 8(c). Factors considered probative of antiunion animus in discharge cases include: Timing of employer's reaction to union activity; presence of other unfair labor practices; failure to investigate conduct alleged as the basis for the discipline; disparate treatment; implausibility of the employer's explanation of its activities; inconsistency of explanation; and the seriousness of the violation. *Valmont Industries, Inc. v. NLRB*, 244 F3d 454 (2001). Additional factors include failure to warn; failure to explain to the employee the reasons for discipline; and delay in making the decision. *Great Atl. & Pac. Tea Co.*, 210 NLRB 593 (1974); *United Service Corporation dba Forest Park Ambulance Service*, 206 NLRB 550 (1974), *Coca-Cola Bottling Company of Memphis*, 232 NLRB 794, *enf*, in part, 616 F2d 949 (6th Cir.) *cert den*. 449 U.S. 998 (1980).

Another key principle to consider is the proximity of engagement in protected activities and any adverse employment actions by the employer. If a person engaged in such activities a significant period of time prior to the adverse employment actions of the employer, it would strain credulity to link the events together. In NLRB v. Lampi, LLC, 240 F3d 931 (11th Cir. 2001), Lampi campaigned against a union organizing effort. Ms. Neely actively supported the union, a fact known to management; and she testified in a consolidated unfair labor practice/election proceeding in March of 1996. There was no evidence that a supervisor spoke to her about her testimony. She was terminated four months later. In refusing to enforce the Board order, the court noted there to be only a "flimsy" causal connection. In Valmont Industries, Inc. v. NLRB, 244 F3d 454 (5th Cir. 2001), the court stated that the strongest circumstantial evidence is the proximity in time between the union activity and employee discipline, but that ten months was too long, particularly where there was no evidence that a second organizational effort was under way. In NLRB v. Florida Medical Center, Inc., 576 F2d 666 (5th Cir 1978), the discriminatee passed out authorization cards; she was told by a supervisor that she could not pass out cards at work and was reprimanded; and for the next six months her efforts to organize continued without incident, when she was terminated. The Court, in refusing enforcement, stated:

"* * While there is substantial evidence to support a finding of extreme union animus at the beginning of this episode, there is little if any evidence to support a theory that the fire had not burned down by the time of the Stern incident."

LEGAL ARGUMENT

The ALJ reached the following conclusions:

- On the 8 (a)(3) charge, that the General Counsel had established, under *Wright*Line, a prima facie case. Second, that the Respondent had rebutted it by proof of misconduct on the part of the discriminatee; and
- On the 8(a)(1) charge, that the General Counsel had failed to establish that the conduct of the discriminatee was protected.

The Brief and Exceptions filed by the General Counsel are simply a reorganized scatter gun rehash, with adjectives and pejoratives added, of its submission to the ALJ.

The Administrative Law Judge Correctly Dismissed The 8(a)(1) Charge

The facts related to this charge are not disputed. Ms. George had a conversation with two coworkers. In that conversation she led a coworker to believe he was about to be terminated. There was no discussion of unions, or mutual aid or protection, or any form of present or future concerted action. Mr. Boros reported to the Company that Ms. George said that he was going to be terminated. The Company knew and informed Mr. Boros that he was not being terminated. When the Company confronted Ms. George, she denied having this conversation. And it is clear that this conversation was a critical part of the decision to terminate Ms. George.

The Acting General Counsel asserts that Ms. George's conversation was protected, within the meaning of *Cadbury Beverages*, 324 NLRB 1213 (1997), *enfd.* 333 U.S. App. D.C. 94 (D.C. Cir. 1998) and *Jhirmack Enterprises*, 283 NLRB 609, fn. 2 (1987). The ALJ held that both of these cases were distinguishable, and the rule of decision was properly enunciated in *Mushroom Transportation Company*, v. NLRB, 330 F2d 683, 685(3rd Cir. 1964) and *Daly Park Nursing Home*, 287 NLRB 710, 710-711 (1987). Her analysis was both insightful and correct.

Each of these cases stand for the same basic propositions:

- Concerted activity exists when an object of the act or statement was to induce or initiate actions beneficial to other employees; and
- Activity which consists merely of talk must, to be protected, be talk looking toward action. Mere griping is not protected.

A review of the facts of the two lead cases relied upon by the Acting General Counsel underscores that they are inapposite.

In *Cadbury* the discriminatee was terminated because he attended, during his approved lunch hour, a grievance arbitration in support of a coworker. He had participated in the investigation and preparation of the grievance and had been requested by the grievant to be

present. Further he cautioned the grievant against representation by an assertedly untrustworthy union representative. It is a given that future protected activity was contemplated.

In *Jhirrmack Enterprises*, the discriminatee was discharged because he warned a coworker that unless he improved his work performance in the future he would be discharged. The warning contemplated future work-related action by the warned employee.

This governing distinction is made clear in *Daly* and in *Meyers Industries*, 281 NLRB 882 (1986), *aff'd*. 835 F2d 1481 (D.C. Cir. 1987).

In Meyers the Board stated:

"It is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees."

In *Daly Park*, the NLRB affirmed the decision of an ALJ dismissing an 8(a) (1) charge arising out of discipline of a coworker for talking to other employees about the termination of a coworker. Why? Because there was no suggestion, let alone evidence, that the discussion involved an effort to initiate or promote concerted action.

In *Mushroom Transportation Company v NLRB*, 330 F2d 684 (3rd Cir. 1964), adopted by the NLRB in *Meyers*, the discriminatee spoke to other employees about their rights, e.g. holiday pay, vacation etc. The Court held:

"Activity which consists of mere talk must, in order to be protected, be talk looking toward group action. If its only purpose is to advise an individual as to what he could or should do without involving fellow workers or union representation to protect or improve his own status or working position, it is an individual, not a concerted, activity, and, if it looks forward to no action at all, it is more than likely to be mere 'griping.'"

See also *Ogihara Am. Corp.*, 347 NLRB 110, 113 (2006) (false statements are not protected).

The Administrative Law Judge in this case correctly found:

"* * * there is no evidence that the George/Boros conversation was anything more than an exchange of speculative employee opinions or that

its purpose, explicit or implicit, was to initiate or to induce or to prepare for group action, ***."

As such the 8(a) (1) count in the complaint should be dismissed.

The Administrative Law Judge Correctly Dismissed The 8(a) (3) Charge

All will agree that under *Wright Line*, the General Counsel must prove three elements to establish a prima facie case: Union activity by the employee; employer knowledge of that activity; and employer animus toward that activity. Respondent stipulates that it was aware of union activities of the discriminatee between 6 ½ months and 11 ½ months preceding her termination. Thus two of the elements are not contested. It did contest the union animus issue at trial, but the Administrative Law Judge, parsing through the scatter gun of evidence, found sufficient circumstantial evidence to support the third prong in two limited circumstances, both of which occurred more than eight months prior to the discharge of Ms. George.² Respondent respectfully disagreed with this finding, but does not challenge it here.

The key question then is whether Respondent carried its burden that it would have discharged Ms George, notwithstanding her union activities. Here the ALJ correctly found that Ms George had:

- 1. Been appropriately given a final warning for her work abandonment on January
 15. Further that there was no evidence that such discipline was pretextual.
- 2. Second, she made a fact finding that the Respondent was "genuinely displeased about the reported incident and concerned as to its impact upon Mr. Boros."

Further, she concluded, correctly, that there was no evidence of this decision being motivated by antiunion animus or union activity.

These findings are supported by the record and should be affirmed. Indeed review of the normal litmus tests, *supra* p.11 governing unlawful discharges underscore the reason the 8(a)(3) charge should be dismissed:

² ALJ Decision page 7 lines 15-25.

- Failure to investigate. It took no investigation to determine that she left the premises on the 15th; did not run her route; and refused to answer a call. The Company did investigate the incident of the 18th, speaking with both witnesses, and believing one rather than the other.
- Failure to Warn. She received four (4) warnings in the year preceding termination.
- Failure to explain. Both the incidents of the 15th and 18th were discussed with Ms. George.
- Delay in decision making. Less than 24 hours regarding both incidents.
- Inconsistency of explanation. None.
- Disparate treatment. None shown.

CONCLUSION

It is respectfully submitted that the Complaint should be dismissed.

Dated this 31st day of January 2011.

Respectfully submitted,

SCHWABE, WILLIAMSON & WYATT

Thomas M. Triplett

Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of January 2011, I served the foregoing RESPONDENT'S BRIEF IN RESPONSE TO EXCEPTIONS on the following parties at the following addresses:

Lester A. Heltzer Executive Secretary National Labor Relations Board 1099 - 14th Street, N. W. Room Number 11602 Washington D.C. 20570 E-filing and U. S. Mail Helena A. Fiorianti
Board Agent
National Labor Relations Board
Subregion 36
601 SW Second Ave., Room 1910
Portland, Oregon 97204-3170
Email: helena.fiorianti@nlrb.gov

Paul Cloer AWPPW P. O. Box 4566 Portland, Oregon 97208 Email: paul.cloer@awppw.org

by email and U.S. Mail to them a true and correct copy thereof, placed in a sealed envelope addressed to them at the addresses set forth above said day.

Thomas M. Triplett
Attorneys for Respondent